United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

Docket No: 77-7116

77-7116

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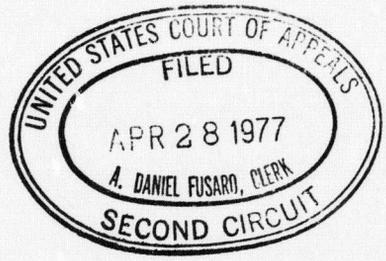

United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

ATTN: A. DANIEL FUSARO
COURT CLERK

RE: AMALGAMATED TRANSIT UNION - DIVISON 580, et al

-v-

CNY REGIONAL TRANSPORTATION AUTHORITY, et al
Docket No: 77-7116

Dear Mr. Fusaro:

This letter is in response to a Reply Brief in the aforecaptioned matter, hand-delivered to the undersigned late yesterday afternoon. It primarily regards the improper analysis therein of Eleventh Amendment (United States Constitution) arguments as relates to this case.

In its Reply Brief at pages 12 et seq., Appellant discusses why Respondents cannot avail themselves of the argument of sovereign immunity. Appellant's arguments are in error.

I. The Central New York Regional Transportation is an arm of the State of New York.

Firstly, this Court, in the case of Monell v. Department of Social Services of the City of New York, 532 F. 2d 259 (1976), cites at page 263 the case of Sams v. New York State Board of Parole, 329 F. Supp. 296, 298-299 (S.D.N.Y. 1972) which, in an interpretation of 42 U.S.C., Section 1983 relating to Civil

Rights, held that the New York City Transit Authority is an Agency and arm of the State of New York, so as to entitle it to sovereign immunity. See also Rudine v. New York City Transit Authority, Case No. 70-1500 (E.D.N.Y. 1971) cited in the Sams case. The New York City Transit Authority is almost identical to the Central New York Regional Transportation Authority, which if anything, is even more state and less locality oriented.

Both the Sams and Rudine cases were decided prior to the Mass Transportation Assistance Program enacted by the State of New York in 1975 (New York Transportation Law Section 18-b and related sections). In New York State, the capital and operating needs of transporation authorities are met in large part directly from the treasury of the State of New York. The Mass Transportation Assistance Program specifically requires the Commissioner of Transportation of the State of New York to keep the Governor and Legislature informed in regard to the costs facing transportation authorities. These costs, be they capital or operating, are subsidized at least annually directly from the state treasury.

Such capital purchases include those for which the Union's 13(c) Agreement was advanced.

Additionally since the Sams and Rudine cases, the New York State Public Authorities Control Board (Article 1-A New York State Public Authorities Law), was created to control the fiscal program of authorities operating within the State.

II. Directors, officers and employees are also immune.

Appellant makes the point that directors, officers and employees of the Authority are not able to plead sovereign immunity and that the action is viable as against them. This is likewise not the law, when such directors, officers and employees have not abused any Constitutional power and are being sued in their official capacity. See Monell, supra at page 265, where this Court discusses the ability of individual defendants to raise the defense of sovereign immunity when there are no allegations that "...the individual defendants acted outside the scope of their offices or in an arbitrary manner".

The Monell case also discusses whether certain declaratory judgment and equitable actions may be maintained against individuals acting in their official capacities, but the Supreme Court has held that equitable relief may not be asserted against State officers when such relief may have a fiscal impact upon the State Agency. The Supreme Court in Edelman v. Jordan, 415

U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) stated at 415 U.S. 666:

> "We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable in nature'... [Haygood and Ayers] were both actions against State officers for specific performance of a contract to which the State was a party, demonstrating that equitable relief may be barred by the Eleventh Amendment".

III. There was no waiver.

Appellant advances the argument that the clause in the enabling legislation of the Authority that it is empowered to sue and to be sued, constitutes a waiver of Eleventh Amendment rights. This is not true. See Rothstein v. Wyman, 467 F. 2d (1972), in which this Court stated:

> "With respect to the matter of waiver, it is unquestionably true that a State may voluntarily relinquish the shield of the Eleventh Amendment, but as is always the case in the area of alleged waivers of Constitutional rights, that relinquishment must be shown to be clear and unequivocal".

In many cases by this Court as approving sovereign immunity, such as those regarding the New York City Transit Authority supra, this Court made such judgment when such State agencies had included within their enabling legislation the power to sue and to be sued and where they were required by statute to operate on a self-sustaining basis (See N.Y. Public Authorities Law, sections 1204 (1) and 1205).

Unlike the California v. Taylor, case cited by Appellant in its Reply Brief at page 16, the instant case is not the testing of the Eleventh Amendment against war powers, nor is it involved with a proprietary function run by the government at a profit, (as was likewise expressed in Parden v. Terminal R. Co., also cited by Appellant at page 16 of its Brief). This case is one

of a public transportation authority of the State of New York which operates continuously on a deficit, reimbursed by the State and other governmental sources, which make capital purchases with State subsidy, which operates, as the Usery and Staten Island Rapid Transit Operating Authority cases indicate, in an area which is now considered governmental and not proprietary. It exercises powers and functions which the Legislature of the State of New York specifically considers essential governmental functions (New York Public Authorities Law, Section 1329).

That mere participation in the subsidy program is not a waiver of sovereign immunity was continued by the Edelman case in which the Court held, at 415 U.S. 673:

> "The Court of Appeals held that as a matter of Federal Law, Illinois had 'constructively consented' to this suit by participating in the Federal AABD Program and agreeing to administer Federal and State funds in compliance with Federal Law. Constructive consent is not a doctrine commonly associated with the surrender of Constitutional rights and we see no place for it here. In deciding whether a State has waived its Constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'...
>
> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid, is not sufficient to establish consent on the part of the State to be sued in the Federal Courts".

IV. Improper Recitation of 13(c) Agreement.

The analysis in the Reply Brief of the 13(c) Agreement advanced by Appellant in outline form, is not the form of the 13(c) Agreement itself, underlining even more the questions of fact which go to the merits of this case.

V. Improper Analysis of Congressional Record.

The remarks of Senator Morse in the Reply Brief that no monies would go to any States' operations if that State prevented

collective bargaining and the consequent attempt by Appellant to equate "collective bargaining" with "loss of right to strike" is misleading.

Public employees in New York State enjoy collective bargaining under the Taylor Law. In Respondent's Brief at page 38, Senator Morse is specifically quoted as stating that State law (such as the Taylor Law) barring the right to stike would supersede Section 13(c).

The Urban Mass Transporation Act itself in 49 U.S.C. Section 1601a (Congressional Finding and Declaration of Purpose) states in pertinant part:

> "It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy the Urban Mass Transportation requirements". (emphasis added)

VI. Legislatively imposed contracts may be reviewed.

In its Reply Brief, Appellant states that an Article 78 proceeding is not available to review a legislatively imposed contract under the Taylor Law.

In the matter of the City of Rochester and Rochester Fire Fighters, et al, the PERB hearing officer at 7 PERB 4528 specifically held that a legislatively mandated contract, if improper, may be challenged by an Article 78 proceeding. This decision was confirmed by the full PERB Board at 7 PERB 3060 (1974). In Matter of Jefferson County, 6 PERB 3063 at 3064 the PERB Board held that the legislative mandate does not preclude a finding that a refusal to negotiate in good faith was an improper employer practice under Section 209-a of the Taylor Law. See also In the Matter of the Town of Huntington, 3 PERB 3577 (1970). In Jefferson County v. PERB, 36 N.Y. 2d 534, 537 (1975), the New York Court of Appeals held that PERB has the power to establish procedures to provide for and even order that the employer negotiate in good faith as required by the Taylor Law.

VII. Pendant jurisdiction does not exist.

Annexed to this letter is a recent Memorandum and Order of the United States District Court for the Western District of Kentucky at Louisville. It was rendered last week (April 20, 1977). While it is not a 13(c) case, and while it differs slightly from the present case in that it is an application by the Union to

remove a State litigation to Federal Court, it clearly holds that the litigation in that case is non-federal in nature. The Court therein holds that while the Louisville case might implicitly involve elements of the Urban Mass Transportation Act, these are not sufficient bases for jurisdiction in the Federal Courts. The Federal law alleged to be involved must be an essential element of the Plaintiff's case.

It is respectfully submitted that the arbitration clause which the Union seeks to advance, is nothing more or less in terms of Federal subject matter jurisdiction than the alleged arbitration agreement in the Louisville case, and that pendant jurisdiction is inapplicable. This matter is more properly to be decided in the Courts of the State of New York.

Very truly yours,

Barry M. Shulman

BMS/sh

cc: Blitman & King
Attorneys for
Plaintiffs

cc: PERB

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

TRANSIT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY Plaintiff	)	
v.	)	NO. C 76-0535-L(B)
AMALGAMATED TRANSIT UNION, etc., et al. Defendants	)	

MEMORANDUM AND ORDER

Pending is a motion to remand this action to the Jefferson Circuit Court from whence it was removed by defendant on November 29, 1976.

Plaintiff, the Transit Authority of Louisville and Jefferson County ("TARC"), originally filed this suit on November 1, 1976, seeking injunctive relief against the Amalgamated Transit Union, AFL-CIO, et al. ("Union"). In its complaint, TARC contended that a memorandum signed by the parties committed it to the use of good faith in attempting to qualify its employees for the County Employee Retirement System ("CERS"). TARC also asserted that the memorandum envisioned the exercise of TARC's business judgment in deciding whether participation in CERS was economically feasible.

In a grievance filed by the Union it was asserted that the aforementioned memorandum was violated by TARC because it failed to qualify its employees for the plan. The Union has demanded arbitration of the issue; TARC subsequently filed suit in state court in hopes of enjoining any arbitration procedure. The Union has countered by petitioning this Court for removal pursuant to 28 U.S.C. 1441(b) and 1331(a).

It is well settled that federal question jurisdiction must appear on the face of the complaint in order to justify removal of the case from state to federal court. In Gully v. First National Bank in Meridian, 299 U.S. 109, 57 S.Ct. 96 (1936), the Supreme Court, per Justice Cardozo, stated:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the Statute, a right or immunity created... by the laws of the United States must be an element, an essential one, of the plaintiff's cause of action.... The controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.... Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense...." 299 U.S. at 112-113.

The tenets of that opinion were recently reaffirmed in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 94 S.Ct. 1002 (1974). Therefore, there is no reason to surmise that Gully has grown hoary with age.

Having established the appropriate test, we note that the Union here had the burden of establishing that removal was proper. Bd. of Education v. American Fed. of S., C.&M.E., AFL-CIO, 401 F.Supp. 687, 689 (D.C. Ga., 1975); Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97, 42 S.Ct. 35, 37 (1921).

Against such a background of authority, it is apparent that the Union has failed to establish the removal jurisdiction of this Court.

The heart of this action lies in the body of contract law generated in the Commonwealth of Kentucky. TARC's complaint might implicitly involve elements of the Urban Mass Transportation Act, 49 U.S.C. 1601 et seq., but these are not sufficient bases for jurisdiction in this forum. The federal law alleged to be involved must be an essential

element of plaintiff's case if defendant is to prevail; Gully, supra. There has not been a clear demonstration that federal law is dispositive of the action. This court is, of course, mindful of the rule that the existence of a federal question depends upon the "real nature of the claim asserted by the plaintiff in his complaint", regardless of a plaintiff's possible efforts to artfully characterize his claim as purely non-federal. Bd. of Education, supra. Here, however, plaintiff's reference to "federal law" in his complaint is nothing more than an anticipation of a possible defense. As such, it is an insufficient peg upon which to hang removal jurisdiction.

Accordingly, this Court holds that this case was removed without jurisdiction and hereby ORDERS that it be remanded to Jefferson Circuit Court. 28 U.S.C. 1447(c). The Clerk of the Court is to mail a certified copy of the Order to the Clerk of that Court. Defendant shall bear the costs of removal.

This 20th day of April, 1977.

RHODES BRATCHER
United States District Judge

Copies to:

Counsel of record

ENTERED
APR 20 1977
JESSE W. GRIDER, CLERK
BY DEPUTY CLERK